CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 331

DOMINIC A. TRUDA, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED AUGUST 31, 1932

CERTIORARI GRANTED OCTOBER 24, 1932

(37,028)

SUP

ON I

Record

Peti

Gen

Arg

Spec

Cone

Opin

Judg

Clerl

Order al

(37,028)

UPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 331

DOMINIC A. TRUDA, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

INDEX

	Original	Print
cord from Court of Claims	1	1
Petition	1	1
General traverse	9	5
Argument and submission of case	9	6
Special findings of fact	11	6
Conclusion of law	14	11
Opinion of the court by Littleton, J.	14	11
Judgment	15	11
Clerk's certificate (omitted in printing)	17	
ler allowing certiorari		13

D & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 14, 1932

[fol. 1]

IN THE COURT OF CLAIMS

No. L-15

DOMINIC A. TRUDA, Plaintiff,

vs.

THE UNITED STATES, Defendant

I. PETITION—Filed January 22, 1930

To the Honorable the Chief Justice and Judges of the Court of Claims:

I

The plaintiff is an individual with his residence at 560 Westminster Road, Brooklyn, N. Y.

II

The plaintiff and the partnership of which he was a member during the year 1917—namely, McDonnell & Truda, 5 State Street, New York, N. Y.—duly filed their income-tax [fol. 2] returns for the year 1917 and paid the taxes shown thereon to be due.

III

In March, 1923, the Commissioner of Internal Revenue made a jeopardy assessment against the partnership of McDonnell & Truda of an additional tax for the year 1917 in the amount of $100,005.14. On December 17, 1925, the Commissioner advised the partnership that this assessment was erroneous and that the partnership had been overassessed to the extent of $75,141.86. The letter of December 17, 1925, states:

"The audit of the partnership cannot be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

IV

On February 12, 1926, C. R. Nash, Assistant to the Commissioner, wrote the plaintiff as follows:

"Reference is made to Bureau letter dated November 30, 1925, wherein you were advised that an audit of your income tax return for the year 1917 resulted in the determination of a deficiency in tax of $5,485.18 due to assessment under the provisions of Section 210 of the Revenue Act of 1917 of the partnership of McDonnell and Truda, of which you are [fol. 3] a partner, and requesting you to execute a waiver which was enclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Peter L. McDonnell.

"You are, therefore, requested to execute and return to this office, the enclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of the partnership's over assessment and your resulting additional tax liability may be made.

"In your letter of transmittal, reference should be made to the symbols IT:E:SM SBD-26737."

V

The plaintiff, acting under duress and in the fear of being arbitrarily penalized, both individually and through an increase in the partnership tax, submitted to the demand made upon him by the Treasury Department by filing a purported waiver of the statute of limitations for making any assessment for the year 1917; said waiver by its terms purporting to extend the time within which the Commissioner of Internal Revenue could assess additional income taxes until December 31, 1926.

VI

On May 22, 1926, the Commissioner issued what is commonly called a "30-day letter" to the plaintiff. This letter [fol. 4] proposed an additional assessment of $5,485.18 and

enclosed a "Waiver of right to file a petition with the United States Board of Tax Appeals," which plaintiff executed.

VII

On July 17, 1926, an assessment of $5,485.18 tax and interest of $128.64 was assessed against the plaintiff, and payment was made to the proper Collector of Internal Revenue on August 13, 1926.

VIII

Claim for refund in the amount of $5,613.82 was duly filed and disallowed by the Commissioner on a schedule dated July 25, 1929. The claim for refund was based on the contentions that the waiver, mentioned in paragraph V of this petition was invalid, and that the tax was collected after the running of the statute of limitations properly applicable thereto.

IX

The statutory provisions relied upon are:

The Revenue Act of 1921:

"Sec. 250(*d*). * * * the amount of any such taxes due under any return made under this Act for prior taxable years or under prior income, excess-profits, or war-profits tax Acts, * * * shall be determined and assessed within five years after the return was filed, unless both the [fol. 5] Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; and no suit or proceeding for the collection of any such taxes due under this Act or under prior income, excess-profits, or war-profits tax Acts, * * * shall be begun, after the expiration of five years after the date when such return was filed, * * *."

The Revenue Act of 1924:

"Sec. 277(a) (2). The amount of income, excess-profits, and war profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court for

the collection of such taxes shall be begun after the expiration of such period."

"Sec. 278(c). Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

The Revenue Act of 1926:

Sec. 277(a) (3). The amount of income, excess profits, and war profits taxes imposed by * * * the Revenue Act of 1917, * * * shall be assessed within five years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period."

"Sec. 1106(a). The bar of the statute of limitations [fol. 6] against the United States in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no credit or refund in respect of such tax shall be allowed unless the taxpayer has overpaid the tax. The bar of the statute of limitations against the taxpayer in respect of any internal-revenue tax shall not only operate to bar the remedy but shall extinguish the liability; but no collection in respect of such tax shall be made unless the taxpayer has underpaid the tax."

The Revenue Act of 1928:

"Sec. 276(b). Waivers.—Where before the expiration of the time prescribed in section 275 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agred upon."

"Sec. 607. Effect of Expiration of Period of Limitation Against the United States.—Any tax (or interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be

credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

[fol. 7]

X

By reason of the action of the Commissioner of Internal Revenue in refusing to refund to this plaintiff the sum of $5,613.82, together with interest from the date of payment, the whole of said amount, plus interest, is now wrongfully and unlawfully withheld from the plaintiff without his consent and against his will by the United States.

XI

No other action has been had on said claim in Congress or by any of the departments; no other person than the plaintiff is the owner thereof or interested therein; no assignment or transfer of these claims, or any part thereof or interest therein, has been made; plaintiff is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets. The plaintiff has at all times borne true faith and allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government.

Wherefore plaintiff asks judgment against the United States in the sum of $5,613.82 with interest thereon from August 13, 1926.

Dominic A. Truda, by Robert Ash, Thomas J. Reilly, Munsey Building, Washington, D. C., Attorneys for Plaintiff.

[fol. 8] *Duly sworn to by Dominic A. Truda. Jurat omitted in printing.*

[fols. 9 & 10] II. General Traverse—Filed March 1, 1930

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charles P. Sisson, Assistant Attorney General.
AJL/CFK.

III. Argument and Submission of Case

On October 13, 1931, this case was argued and submitted on merits by Mr. Robert Ash for the plaintiff, and by Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

[fol. 11] IV. **Special Findings of Fact, Conclusion of Law, and Opinion of the Court by Littleton, J.**—Entered May 31, 1932

Mr. Robert Ash for the plaintiff.

Mr. J. W. Hussey, with whom was Mr. Assistant Attorney General Charles B. Rugg, for the defendant.

This suit is for the recovery of $5,613.82, with interest from August 13, 1926, income tax paid for the calendar year 1917. Plaintiff claims that a waiver of the statute of limitation executed by him was invalid and the tax was therefore collected after the expiration of the time allowed by law.

Special Findings of Fact

1. Plaintiff filed his individual income-tax return for 1917, March 29, 1918, and paid the tax shown thereon to be due. The partnership of McDonnell & Truda, of which he was a member during 1917, filed its return of income on Form 1065 on April 1, 1918, and paid the tax shown thereon to be due.

March 18, 1923, the commissioner made a jeopardy assessment of $100,005.14, excess-profits tax for 1917, against the partnership, and a claim in abatement was filed protesting the amount of the tax assessed.

2. November 30, 1925, the Committee on Appeals and Review having considered the case of the partnership and having recommended that the profits tax of the partnership for 1917 be computed under the special relief provisions of section 210, revenue act of 1917, the commissioner advised the plaintiff as follows:

"Reference is made to the appeal dated March 24, 1924, of the partnership of McDonnell and Truda, 5 State Street, New York, New York, of which you are a member, for as-

sessment of its excess-profits tax for 1917 under the provisions of section 210 of the revenue act of 1917.

"You are advised that consideration of the application has been completed, indicating an overassessment of $75,-141.86. However, a reduction of the excess-profits tax liability of the partnership necessitates a corresponding increase in the distributive interests of the partners and a corresponding increase in the taxable net income, resulting in additional tax liabilty for each partner. Your additional tax liability is $5,485.18.

[fol. 12] "Inasmuch as the limitation of time within which to assess the $5,485.18 has expired, you are requested to execute and return to this office the enclosed form of waiver, to facilitate the adjustment of the partnership's overassessment and your resulting additional tax liability."

3. December 17, 1925, the commissioner mailed the following letter to the partnership:

"Receipt is acknowledged of your letter dated December 10, 1925, wherein you state that a letter has not as yet been received by you showing the amount of income and excess-profits tax finally determined to be due for the year 1917, and requesting that this letter be forwarded before compliance with the request of this office in bureau letters dated November 30, 1925, that waivers be furnished for the partners, Peter L. McDonnell and Dominic A. Truda.

"In the letters to Peter L. McDonnell and Dominic A. Truda mentioned above, they were advised that an audit of the partnership of McDonnell and Truda under section 210 of the revenue act of 1917 resulted in the determination of an overassessment of $75,141.86.

"The audit of the partnership can not be completed and no further action can be taken until waivers are on file for Peter L. McDonnell and Dominic A. Truda. When these waivers are received properly signed, a letter will be issued to you showing the computation of the tax resulting in the above overassessment."

4. February 12, 1926, the Bureau of Internal Revenue, not having received a reply from the plaintiff to the letter of November 30, 1925, again wrote him as follows:

"Reference is made to bureau letter dated November 30, 1925, wherein you were advised that an audit of your in-

come-tax return for the year 1917 resulted in the determination of a deficiency in tax of $5,485.18 due to assessment under the provisions of section 210 of the revenue act of 1917 of the partnership of McDonnell and Truda, of which you are a partner, and requesting you to execute a waiver which was inclosed for the purpose, in order that adjustment could be made of the overassessment of $75,141.86 determined for the partnership.

"Under date of December 17, 1925, in reply to a letter from the above-named partnership dated December 10, 1925, the partnership was advised that no further action would be taken until waivers are on file from you and your partner, Mr. Peter L. McDonnell.

"You are, therefore, requested to execute and return to this office, the inclosed form of waiver within fifteen days from the date of this letter, in order that adjustment of the partnership's overassessment and your resulting additional tax liability may be made."

February 23, 1926, plaintiff and the commissioner consented in writing to the assessment and collection of any tax determined to be due by the commissioner for 1917 beyond the period of limitation provided in the statute. This consent waived "the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year 1917 under existing revenue acts, or under prior revenue acts, to the extent of $5,485.18 conditioned upon the proposed additional assessment against McDonnell & Truda for the year 1917 of excess-profits tax, the sum being fixed as $24,863.28."

[fol. 13] This waiver was accompanied by a letter signed by plaintiff's representative and attorney in fact, dated February 23, 1926, in part as follows:

"Agreeable to your request, these waivers have been signed and are herewith enclosed * * *.

"I wish to state that it has always been the desire of these two gentlemen to pay all the income taxes justly due from them without any attempt to evade such payments by any means whatsoever * * *.

"When the waivers for 1917 were requested by you they were not withheld in an effort to evade the tax, but it did

impose a great hardship upon them to surrender a statutory right, which would inflict a tax of some $12,000.00 on them * * *. However, as an evidence of good faith, these waivers have been signed and forwarded to you.

"In requesting a conference I feel sure that by getting together with your conferee in Washington we can finally arrive at an amount which is acceptable to the commissioner and Messrs. McDonnell and Truda, which amount can then be paid and all tax matters for 1917 closed once and for all. We have no desire to take any part of the taxes in controversy before the Tax Board and are quite eager to settle it as expeditiously as possible within the Internal Revenue Department. The waivers are sent along with this letter as evidence of good faith in order that your conferee may feel thoroughly sure that no unfair advantage is sought by groundless appeals or other delays."

5. May 22, 1926, the commissioner mailed to the partnership a letter accompanied by a detailed statement showing his final determination of the 1917 tax liability of the partnership. This letter reduced the additional assessment made against the partnership of $100,005.14 to $24,863.28, and advised the partnership, as follows:

"You are advised that after careful consideration and review, your application for assessment of your excess profits tax under the provisions of section 210 of the revenue act of 1917 has been allowed. Your excess profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade or business to that of your company.

* * * * * * *

"In accordance with the above conclusions, your claim for the abatement of $100,005.14 will be rejected for $24,863.28."

A certificate of overassessment was duly issued to the partnership.

6. May 22, 1926, the commissioner notified the plaintiff by what is commonly known as a "thirty-day letter" of a proposed assessment of a deficiency of $5,485.18 against him for 1917, as follows:

"An audit of your individual income-tax return for the calendar year 1917 has resulted in the determination of a deficiency in tax of $5,485.18, as shown in the attached statement.

* * * * * * *

"If a protest is filed, any additional evidence or briefs of argument submitted will be given careful consideration, and if the commissioner finally determines that there is a [fol. 14] deficiency, you will be advised thereof by registered mail in accordance with the provisions of section 274 of the revenue act of 1926. Should you not agree to the deficiency as finally determined by the commissioner, you will be allowed sixty days from the mailing of the registered letter in which to file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency."

There was inclosed with this letter to the plaintiff a "Waiver of right to file a petition with the United States Board of Tax Appeals," which plaintiff executed June 18, 1926, and filed June 21, 1926, in which he stated that "The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under section 274 (a) of the revenue act of 1926 and consents to the assessment and collection of a deficiency in tax for the year 1917 aggregating $5,485.18.

"This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under section 1106 of the revenue act of 1926."

7. July 17, 1926, the commissioner made an additional assessment of tax against the plaintiff of $5,485.18 and interest of $128.64, and payment thereof was made August 13, 1926.

December 24, 1928, plaintiff filed a claim for refund of $5,613.82, being the additional tax and interest so paid, on the ground that the waiver of the statute of limitations theretofore executed by him was invalid and that the amount claimed was collected after the running of the statute of limitation. The claim was rejected by the commissioner on a schedule dated July 25, 1929.

Conclusion of Law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion

Littleton, Judge, delivered the opinion of the court:

The question in this case is whether the waiver of the statute of limitation entered into between the plaintiff and the commissioner February 23, 1926, was invalid. We have considered and decided this question in Peter L. McDonnell v. United States, No. K-488, decided this date, in which it is held that the waiver was valid and that collection was therefore timely.

For the reasons stated in the McDonnell case, this plaintiff is not entitled to recover. The petition is dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Green, Judge, and Booth, Chief Justice, concur.

[fols. 15 & 16] V. Judgment

At a Court of Claims held in the City of Washington on the 31st day of May, A. D., 1932, Judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and his petition is therefore dismissed.

Judgment is rendered against plaintiff for the cost of printing the record herein, the amount thereof to be entered by the clerk and collected by him according to law.

No printing having been done by the Court, no costs are taxed.

[fol. 17] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 37,028. Court of Claims. Term No. 331. Dominic A. Truda, petitioner, vs. The United States. Petition for writ of certiorari and exhibit thereto. Filed August 31, 1932. File No. 37,028.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1932

The petition herein for a writ of certiorari to the Court of Claims is granted, limited to the question of the validity of the waiver under Sec. 278 (e) of the Revenue Act of 1924.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.